



April 29, 2019

Criminal Jurisprudence Committee
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Via Hand Delivery

Re: H.B. 3920

Dear Members of the Criminal Jurisprudence Committee:

We are writing on behalf of Civil Rights Corps to affirm and emphasize why reform of Texas' State Counsel for Offenders (SCFO) office is urgently needed.

Because SCFO's management is controlled by the Texas Department of Criminal Justice (TDCJ), which investigates, incarcerates, and prosecutes SCFO's clients, SCFO attorneys violate the Sixth Amendment to the United States Constitution every single day. Allowing a prison system to run a public defender's office fundamentally undermines the adversarial system that is enshrined in our Constitution, subjecting the state to constitutional liability and threatening the integrity of every case that involves the SCFO.

SCFO's core duty is to represent indigent people currently incarcerated in the Texas prison system when they are charged with crimes. But SCFO is currently a division of the TDCJ, and SCFO's director reports directly to the Texas Board of Criminal Justice (TBCJ). This is a conflict of interest. The mere structure of SCFO renders it unconstitutional; but even if that were not true, Civil Rights Corps has uncovered compelling evidence that the office operates under an actual and pervasive conflict of interest, which renders every conviction secured in a case in which SCFO appeared subject to reversal on appeal.

Proposed H.B. 3920 (with one amendment, which we discuss in Section IV below) would address the constitutional violations detailed in this letter. We strongly urge Committee members to make the necessary amendment and, with that amendment, we recommend passage.

I. About Civil Rights Corps

Civil Rights Corps is a nonprofit organization that uses litigation and policy work to challenge injustice in criminal legal systems nationwide. Our litigation includes challenges to wealth-based pretrial detention, wealth-based denials of driving privileges, wealth-based jailing for unpaid court debt, probation extension for unpaid court debt, prosecutorial misconduct, and

constitutional violations of the Sixth Amendment right to counsel. Recently, our organization settled a lawsuit in Galveston, Texas, which challenged on First Amendment grounds a County Criminal Court at Law judge’s decision to remove an attorney from cases to which he was assigned and to refuse to assign him to further cases because the attorney sought to zealously represent his clients.

II. Constitutional Requirements of Effective Assistance of Counsel

The Sixth Amendment protects the right to effective assistance of counsel—that is, the right to be free from *ineffective* assistance of counsel. Ineffective assistance can take two basic forms: incompetence and disloyalty. The incompetence-based ineffective-assistance-of-counsel inquiry, articulated in *Strickland v. Washington*,¹ asks whether counsel’s performance may have resulted in an unfair outcome on the defendant’s case. To establish ineffective assistance of counsel, a defendant must make two showings. First, he must show that his lawyer’s performance was constitutionally deficient because it fell below an objective standard of reasonableness.² Second, the defendant must show that he was prejudiced by his counsel’s deficient performance.³ That is, the defendant must show that there is a reasonable probability that, but for his counsel’s specific errors and omissions, the result of his proceeding would have been different. To successfully make this claim, the defendant must point to specific errors and omissions and show that there is a reasonable probability that, but for those mistakes, the defendant would have been acquitted, received a lesser sentence, or been convicted of a less-serious charge.⁴

Claims based on counsel’s loyalty are more straightforward. The Supreme Court explained the Sixth Amendment conflict-of-interest doctrine in cases starting with *United States v. Glasser*.⁵ In *Glasser*, the Court held that “the ‘Assistance of Counsel’ guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.”⁶ In *Holloway v. Arkansas*, the Court held that although “joint representation [of co-defendants] is not per se violative of constitutional guarantees of effective assistance”—because sometimes the defendant benefits from joint representation⁷—when an actual or imminent conflict is “brought home to the court” by counsel’s requests for separate representation of co-defendants, convictions must be reversed regardless of the probable effect on the outcome of the case.⁸ This rule gives rise to a trial-court duty to inquire into the possibility of a conflict where a single attorney is representing co-defendants or where it is otherwise reasonable to suspect that conflicting interests might arise,⁹ and to insist on separate representation of defendants with conflicting interests wherever the

¹ 466 U.S. 668, 692 (1984). *Hill v. Lockhart*, 474 U.S. 52 (1985), governs ineffective assistance that results in foregoing the right to a trial by pleading guilty. The inquiry is essentially the same: But for counsel’s deficient advice, is there a reasonable probability that the defendant would not have waived his right to go to trial? *Id.* at 59.

² *Strickland*, 466 U.S. at 688.

³ *Strickland*, 466 U.S. at 691–92.

⁴ *Id.* at 693.

⁵ 315 U.S. 60 (1943).

⁶ *Id.* at 70.

⁷ *See Glasser*, 315 U.S. at 92 (Frankfurter, J., concurring) (“[A] common defense . . . gives strength against a common attack.”).

⁸ *Holloway v. Arkansas*, 435 U.S. 475 (1978); *see also Cuyler v. Sullivan*, 446 U.S. 335 (1980).

⁹ *See generally* WAYNE R. LAFAVE, ET AL., *The trial court duty to inquire*, 3 CRIMINAL PROCEDURE § 11.9(b) (4th Ed. 2018).

court knows or should know of the existence of an actual conflict.¹⁰ And, in *Mickens v. Taylor*, the Court reiterated¹¹ that defendants must have their convictions overturned whenever they can show that their lawyers' conflict of interest had any effect on their *performance* in the case; defendants need not show that the adverse performance possibly (or probably) affected the *outcome* of that case.

The Supreme Court views attorneys' representing clients with actively conflicting interests as so pernicious to the administration of justice that defendants, in some circumstances, cannot agree to it even if they want to.¹² Trial courts have an independent duty to ensure fair proceedings. That duty is sufficiently powerful that it overcomes a defendant's (stated) desire to be represented by the attorney of his choice.

Courts across the country have been clear that convictions must be overturned whenever a defense attorney works for an agency that employs a potential witness against the defendant,¹³ and even where a defense attorney works for a prosecuting agency with *no* relationship to the defendant.¹⁴ In *People v. Washington*,¹⁵ the Supreme Court of Illinois reversed the conviction of a man who was prosecuted in the City of Chicago and was represented by an attorney who simultaneously represented the City of Chicago Heights, one of whose officers was called to testify against the defendant.¹⁶ "The defendant's attorney had an obligation to vigorously defend the accused," the court wrote, "which included here the simultaneous obligation to oppose and to attempt to discredit a police officer and representative of the municipality he was serving as its prosecutor."¹⁷

III. Constitutional Deficiencies of the SCFO

The current structure of SCFO violates these constitutional requirements, putting each conviction in which an SCFO attorney appeared as counsel at risk of reversal.

¹⁰ *Cuyler*, Cite.

¹¹ In *Holloway*, 438 U.S. at 489, the Court explained that an unconstitutional "actual" conflict of interest is "never harmless error." In *Mickens*, the Court clarified that the question in conflict cases is whether conflicting interests caused counsel to "pull his punches," *id.*, but *not* whether the pulling of those punches affected the outcome of the case.

¹² *Wheat v. United States*, 486 U.S. 153 (1988).

¹³ *People v. Washington*, 461 N.E.2d 393 (Ill. 1984) (citing *Cuyler*, 446 U.S. 335, and *Glasser*, 315 U.S. 60, and overturning conviction for unconstitutional structural conflict of interest);

¹⁴ *State v. White*, 114 S.W.3d 469 (Tenn. 2003) (overturning Shelby County conviction where appointed defense attorney was a part-time prosecutor for town located within Shelby County); *State v. Brown*, 853 P.2d 851, 856–57 (Utah 1992) ("We conclude that vital interests of the criminal justice system are jeopardized when a city prosecutor is appointed to assist in the defense of an accused. Consequently, we hold that as a matter of public policy ... counsel with concurrent prosecutorial obligations may not be appointed to defend indigent persons."); *Howerton v. State*, 640 P.2d 566, 567 (Okla. Crim. App. 1982) ("[A] part-time district attorney may not be appointed to defend persons either within or outside the jurisdiction in which he serves as assistant district attorney. A district attorney[']s ... first and foremost duty is to represent the State in criminal proceedings... he cannot represent a defendant where the State of Oklahoma is the opposing party. One cannot adequately serve two masters."); *People v. Fife*, 392 N.E.2d 1345 (Ill. 1979).

¹⁵ *Id.*

¹⁶ *Id.* at 396–97.

¹⁷ *Washington*, 461 N.E.2d at 397.

Under *Washington*, SCFO’s structure is inherently unconstitutional. In *Washington*, the defense attorney merely prosecuted cases on behalf of Chicago Heights at the same time as he represented the defendant, and therefore “a struggle inevitably ar[ose] between counsel’s obligation to represent his client competently and zealously, and a public prosecutor’s natural inclination not to anger the very individuals whose assistance he relies upon in carrying out his prosecutorial responsibilities.”¹⁸ Here, SCFO attorneys are employed *in their capacity as defense counsel* by the agency that is testifying against their clients *in the same case*. Because SCFO attorneys answer directly to the TBCJ—without any formal or practical protection from interference—they operate under an actual conflict of interest in every one of their cases. As a result, *all* the resulting convictions must be set aside on appeal; TBCJ is liable for violating the Constitution, without regard to the possible outcome that conflict had on the case.

Even if that were not true, SCFO’s unconstitutional structure has resulted in adverse effects on its representation of its clients, which alone exposes the State to significant liability and puts numerous convictions at risk of reversal. Our investigation has revealed that SCFO attorneys are subjected to pervasive interference with their ability to represent their clients.

The current structure of the SCFO violates the Constitution and substantially enhances the office’s legal vulnerability. Based on both the SCFO’s inherent unconstitutionality and well-documented evidence that this office now operates under an actual and pervasive conflict of interest, we believe that the SCFO’s structure leaves it vulnerable to legal challenge: Every conviction secured in a case in which SCFO appeared as counsel is subject to reversal on appeal.

IV. Proposed Amendment

Proposed H.B. 3920 broadly addresses the concerns that are outlined in this letter, creating an independent office to provide legal services for indigent inmates and other persons in secure correctional facilities. However, the current text requires one modification to satisfy the constitutional requirements described in this letter.

In this version of the legislative text, the head of the new office would be chosen by the Court of Criminal Appeals. In our view, judicial selection of defense chiefs can lead to dangerous results, as evidenced by our recent case in Galveston County, mentioned above. Instead, the board created by the Act should directly choose the head of the counsel’s office, rather than suggest a slate of three from which the Court of Appeals can choose. This small change would substantially enhance the independence of the office to meet constitutional requirements and will therefore address potential legal vulnerabilities.

V. Conclusion

Merely to explain the structure of SCFO is to condemn it. The time has long-since come to remedy that structure and to ensure that people in the Texas prison system are afforded the adversarial trial that the framers of the Constitution intended for them. The status quo presents a

¹⁸ *Washington*, 461 N.E.2d at 397 (internal citations and quotation marks omitted).

significant risk of liability. This Committee should therefore make the change outlined in this letter and recommend the passage of H.B. 3920.

Respectfully,

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